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Albert J. Castagno and Bernice B. Castagno v. Melvin Church and Esther C. Church: Brief of Respondents

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH SEP 15 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

ALBERT J. CASTAGNO and
BERNICE B. CASTAGNO, his
wife,

Plaintiffs-Respondents,

vs.

CASE NO. 14412

MELVIN CHURCH and ESTHER
C. CHURCH, his wife,

Defendants-Appellants.

BRIEF OF RESPONDENTS

Albert J. Castagno and Bernice B. Castagno

Appeal from the Judgment of the Third
Judicial District Court of Tooele County,
Gordon R. Hall, District Judge,
Presiding

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TABLE OF CONTENTS

	<u>Page No.</u>
Statement Of The Nature Of The Case	1
Disposition In The Lower Court.	1
Relief Sought On Appeal	2
Statement Of Facts.	2
Argument.	6
POINT I. The Contract Is Clear And Unambiguous.	6
POINT II. The Court Did Not Err In Refusing To Look Beyond The Four Corners Of The Contract Since The Intent Of The Parties Was Clear On The Face Of The Contract, The Doctrine Of Frustration Can Be Shown By Extrinsic Evidence And The Court In Fact Permitted All Testimony Offered By Appellants To Show The In- tent Of The Parties Regarding Water Rights And Frustration Of Performance.	12
POINT III. The Court Properly Excluded The Sellers From Supplying The Water Under The Contract And Properly Abated The Con- tract Price For Such Failure Of Perfor- mance.	15
Conclusion.	18
Certificate Of Hand Delivery.	20

CASES AND AUTHORITIES CITED

Hardings Co. v. Eimco Corp., 1 Ut. 2d 320, 323; 226 P.2d 494 (1954)	8
Petty v. Gindy Manufacturing Corporation, 17 Ut.2d 32, 36; 404 P.2d 30 (1965)	11
71 American Jurisprudence 2d, Specific Performance, § 129	18

IN THE SUPREME COURT OF THE STATE OF UTAH

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ALBERT J. CASTAGNO and
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C. CHURCH, his wife,

Defendants-Appellants.

* * * * *

BRIEF OF RESPONDENTS

Albert J. Castagno and Bernice B. Castagno

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by plaintiffs-respondents for Breach of Contract by defendants-appellants under provisions of a Uniform Real Estate Contract.

DISPOSITION IN THE LOWER COURT

Plaintiffs filed a Complaint in the lower court asking for specific performance of the Uniform Real Estate Contract or in the alternative for money damages. The issues were tried to the Court setting without a jury. The Court entered its Findings of Fact, Conclusions of Law and Judgment requiring the defendants to specifically perform the provisions of the Contract with respect to conveyance of

the real property; relieved defendants' of their obligation to convey one second foot of water and awarded plaintiffs a \$12,000.00 abatement of the contract price for failure to furnish the one second foot of water.

From this Judgment defendants appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs-respondents seek affirmance of the judgment of the trial court.

STATEMENT OF FACTS

For clarity, the plaintiffs-respondents will be referred to as buyers and defendants-appellants will be referred to as sellers.

Seller Melvin Church by profession is a well driller. Sellers were owners of 40 acres of land upon which Sellers had drilled a well for water planning to later transfer to the well through approval of an application for a change of point of diversion a water right Seller had obtained in another water district known as the Buzianis right.

Sellers and Buyers duly entered into an Earnest Money Agreement for sale to the Buyers of the 40 acres of land together with one second foot of water; the well already drilled upon the land, and a pump adequate to pump one second foot of water.

Seller Melvin Church made application to the State Engineers' office requesting a change of point of diversion

of the Buzianis water right to the diversion point of the well drilled upon the 40 acres. The application was denied.

Discussion with the State Engineers' Office revealed the possibility of another source of water, the point of diversion of which might be successfully diverted to the location point of the well on the subject 40 acres.

Assignments of the other water right (known as the Barnard Castagno (deceased) right) was effected.

The Sellers and Buyers executed a Uniform Real Estate Contract on December 14, 1973, incorporating therein the terms of the Earnest Money Agreement previously entered into.

Pursuant to the Uniform Real Estate Contract Buyers were to pay Sellers \$32,000.00 as a total purchase price, at 8% interest per annum, of which \$16,000.00 was paid as a cash down payment and the remaining balance was to be paid at \$2,500.00 per year beginning December 15, 1974, and a like sum annually thereafter until the purchase price was paid in full.

For that consideration Sellers were to convey to Buyers forty (40) acres of land, one second foot of water, a well certificate #_____ and an electric pump sufficient to pump one second foot of water.

Twenty (20) acres of land was to be deeded to Buyers upon down payment, which was done, the next contiguous ten (10) acres was to be deeded upon payment of the next

\$8,000.00 and the final ten (10) acres was to be deeded upon payment in full of the contract.

Buyers were to take possession of the property on the 1st day of January, 1974, and have exclusive use of the said well and electric pump and two second feet of water from said well during the period of the contract.

Sellers further agreed to drill an additional six (6) inch well on the premises for the sum of \$500.00 which was done.

The Buyers took possession, planted crops in the Spring of 1973, purchased a sprinkling system and attempted to use water from the well on the property pursuant to the terms of the contract, but were prevented from the use thereof by the Utah State Engineers' Office, Water Rights Division.

The 1974 planting season passed and Buyers still were without the use of the water. Buyers paid the annual \$2,500.00 payment due December 1, 1974. Buyers then conveyed a portion of the twenty (20) acres of land deeded from Sellers to their daughter who constructed a new house on the premises. With the approach of the 1975 planting season, Buyers were still without the use of the water and on March 13, 1975, tendered to Sellers full payment on the balance of the purchase price. Sellers did not convey the remaining twenty acres of land nor the one second foot of water, and on the 14th day of May, 1975, Buyers filed suit in the

District Court.

The rule of law is so well fixed that authorities need not be cited for the proposition that on appeal the facts and the evidence must be viewed in the light most favorable to the prevailing party below. In this respect, it should be noted that the sellers do not, in their brief on appeal, specifically take issue or object to any Findings of Fact made and entered by the Court below, nor do the sellers claim that any finding is unsupported by evidence. It is suggested therefore, that the appellate court rely on the facts as they were found by the District Court.

Even though the sellers, in their Statement of Facts, restate certain minor portions of the evidence and choose to disregard the uncontroverted Findings of Fact made and entered by the Court, the Trial Court's Findings of Fact are as follows:

"1. That the plaintiffs (buyers) have performed fully the terms of the Contract at issue on their part.

2. That defendants (sellers) have failed to perform that portion of the Contract in which they agreed to provide one second foot of water and the Court finds that the defendants were unable at the time of trial to perform.

3. The Court finds that the real property described in the Contract is of the value of \$1,500.00 per acre, provided one second foot of water is available. That the

reasonable value of the property without one second foot of water provided is \$500.00 per acre and therefore plaintiffs should be awarded specific performance of the Contract and rebate of the terms of the Contract in the amount of \$12,000.00." (Findings of Fact p. 1,2)

The buyers' full performance referred to in the Findings of Fact was the tendering of all monies due and owing under the Uniform Real Estate Contract. (Tr. 16 & 110). The sellers' breach was their failure to convey the remaining twenty acres to the buyers and their failure to provide one second foot of water pursuant to the terms of the Contract.

ARGUMENT

POINT I

THE CONTRACT IS CLEAR AND UNAMBIGUOUS

Sellers attempt in their Brief on Appeal to undermine the clear and exact provisions of the contract concerning the water right to be conveyed to the buyers. However, the Contract between the parties is explicit concerning the water rights to be conveyed. The relevant provisions thereof setting forth the sellers' obligation to transfer a water right to the buyers are as follows:

"Together with electric pump and all water rights including one second foot of water in and to well certificate #_____. Said pump sufficient to pump one second foot of water." (Ex. 1-P Contract, P.1)

"Upon payment in full of said contract price, sellers will convey by warranty deed the final easterly contiguous Ten (10) acres of said property, together with all water right to Well

already drilled upon said property Certificate # _____ including Two (2) second feet of water, one second foot of which Buyer will furnish. Seller to Deed therewith an electric pump for said Well. Sellers guarantee said Pump and Well Certificate # _____ for one (1) year after date hereof. Said electric pump sufficient to pump one second foot of water.

Sellers further agree that Buyers shall have exclusive use of said Well and electric pump and 2 second feet of water from said Well until and during the period of said Contract until paid in full." (Ex.1-P Contract, P.3)

That these and the remaining provisions of the Contract were clear and unambiguous, that Sellers and Buyers clearly understood the obligations of each in performance thereof is clear from the testimony of each at the trial. Buyer, Albert Castagno, testified he was familiar with the terms of the Contract, (Tr. P6 line 3-21), that both parties read the Contract, made corrections therein and initialed the same. (Tr. P6 Line 22-30, P7 Line 1-3).

That the down payment was made and Sellers delivered to Buyers an executed Warranty Deed for Twenty Acres of the property. (Tr. P7 Line 4-16).

At the trial, Seller, Melvin Church testified that it was his intention at the time the Contract was executed to abide by its terms in obtaining one second foot of water and conveying that right to the buyers. (Tr. 87). He also testified that he had obtained the one second foot of water to convey to the buyers but was not ready to convey it to them. (Tr. 88).

Melvin Church's understanding and intention to sell the land with one second foot of water thereon was also clear from his testimony as to his attempts to obtain or transfer water rights to said property subsequent to the execution of the original Earnest Money Agreement entered into between the parties in 1972. (Tr. 83).

This Court has stated in Hardings Co. v. Eimco Corp., 1 Ut. 2d 320, 323; 226 P.2d 494 (1954), that ". . . in the interpretation of contracts, the interpretation given by the parties themselves as shown by their acts will be adopted by the Court."

Melvin Church's original attempt to transfer water to the subject property was a right he had previously acquired, known as the "Buzianis" right. This attempt was prevented by the State Engineers' Office when it would not allow the requested change from one water district to another. (Tr. 39-40). Melvin Church thereafter attempted to have another water right, known as the "Bernard Castagno" right transferred to the subject property. The buyers did not oppose Church's attempts to procure or transfer these other water rights to the subject property. The parties had already entered an earnest money agreement for the sale of the land including one second foot of water, and the sellers' failure to obtain the water would also be detrimental to the buyers' interest in the property. In fact, the buyers took affirmative steps to help sellers procure the water the sellers were obligated

to provide. (Tr. 56-57). Even though all subsequent attempts by Melvin Church to transfer water rights to the subject property were prevented by the State Engineer, the sellers' obligation under the Contract to supply one second foot of water was always clear and the buyers' attempts to help the defendants perform by obtaining other rights never relieved the sellers of their obligation to supply the one second foot of water. It was never asserted by sellers at trial nor should the assertions now be entertained that the terms of the Contract were so ambiguous that the sellers did not intend or know of their obligation to furnish one second foot of water.

The testimony of seller, Melvin Church, as to his intent to furnish the one second foot of water and his testimony as to his conduct in attempting to furnish it completely refute that the Contract terms relative to the sellers furnishing one second foot of water were ambiguous.

Appellants (sellers) in their brief allege that the Contract between the parties was ambiguous since there is a blank after "well certificate #_____", in the Contracts' provisions and assert it was the understanding of the buyers at the time the contract was executed that the term "well certificate #_____" meant a specific water right already existing upon the property.

Prior to the time the buyers took possession of the first twenty acres of the subject property, there was a

well and pump already installed thereon by Melvin Church. (Tr. 20). Both sellers and buyers were knowledgeable of this fact at the time of execution of the Contract and knew no identifying number had been assigned by the State Engineer's Office to that well. The meaning of "well certificate # _____" was clearly and adequately understood and explained by buyer, Albert Castagno, at the trial when he testified on cross-examination as follows:

"QUESTION: I note on the contract, Mr. Castagno, that the contract and the exhibit refer to a certain number and that there is then a line and it's blank; can you tell to what that referred?

ANSWER: Referred to the well permit.

QUESTION: I see. And by that you mean a permit from the State Engineer for the use of water?

ANSWER: For the drilling of the well. It was the well number.

QUESTION: In other words, you are referring to merely the permit to drill the well, not to the water right itself?

ANSWER: True. That is the number -- should be the number permit to drill the well, but we don't know for sure what the number is.

QUESTION: I see. Are you now aware as to what the number is?

ANSWER: We have a number but we're not sure it's the proper one." (Tr. 20, Lines 5-21).

The plain meaning of the words "well certificate # _____" is self evident and the explanation as to its meaning given by the Buyer, Albert Castagno, at the time of the trial was uncontroverted. Therefore, appellants

argument that "well certificate # _____" meant a specific water right in the mind of the buyer at time of execution of the Contract thereby making the contract ambiguous is specious and not consistent with the testimony at the trial. That testimony clearly indicated that in the minds of the sellers and buyers and in actuality there were never any water rights existing upon the subject property at the time the Contract was entered into. In fact, appellants' attorney acknowledged this fact at the trial when he stated the following, concerning the Contract. (Tr. 24).

"Mr. JEPPESEN: It (the Contract) provides that the well is sufficient to pump at least one second foot and the pump will pump one second foot, and that Mr. Church was selling all water rights including one second foot of water in it to the well; certainly applicable to that particular well and I submit, Your Honor, that at the time the contract was executed, the parties knew that there was in fact no water rights pertinent or assigned." (Emphasis added)

The only thing that existed upon the property when the Contract was executed was a well unidentified by number, drilled by the sellers, as was reflected in the Contract.

The Contract provisions were unambiguous to the trial court which had the prerogative to interpret the provisions in light of the evidence and should be sustained therein.

In Petty v. Gindy Manufacturing Corporation, 17 Ut.2d 32, 36; 404 P.2d 30 (1965), this Court said, "More

over, when there is such uncertainty in the language of a contract, it is the prerogative of the trial court to determine the proper interpretation in the light of the evidence".

In the present case, the trial court rendered its own interpretation which is the only plausible explanation of the clause at issue when it said:

THE COURT: "...the way I read Paragraph 3 of the agreement that there is to be a well that was adequate or would allow the use of two second feet; and one of those second feet Mr. Church (seller) was responsible for and if it took some further development and pumping to take care of an additional second foot that would be the responsibility of the buyer." (Tr. 23-24).

The buyers did not care where the sellers obtained the water right to put in the well already drilled upon the subject property their only concern was that the property they had contracted for would have available the one second foot of water bargained for.

POINT II

THE COURT DID NOT ERR IN REFUSING TO LOOK BEYOND THE FOUR CORNERS OF THE CONTRACT SINCE THE INTENT OF THE PARTIES WAS CLEAR ON THE FACE OF THE CONTRACT, THE DOCTRINE OF FRUSTRATION CAN BE SHOWN BY EXTRINSIC EVIDENCE AND THE COURT IN FACT PERMITTED ALL TESTIMONY OFFERED BY APPELLANTS TO SHOW THE INTENT OF THE PARTIES REGARDING WATER RIGHTS AND FRUSTRATION OF PERFORMANCE

It is clear that sellers, among other things, intended to convey forty acres of land and one second foot of water to the buyers pursuant to the terms of the Contract. Appellants now contend the trial court erred in refusing

to hear testimony concerning the identity of the water rights the sellers intended to supply.

This argument is simply not supported by the record. The Court, early in the trial proceedings, sustaining plaintiffs' objection based upon the parol evidence rule, refused to hear testimony concerning discussions between the parties about the source of the water right to be acquired.

Counsel for sellers, in their brief, argue it was necessary to show the intention of the parties relative to the source of the water right to be furnished and to have been provided. To do so would have shown sellers frustration and impossibility to perform in supplying the one second foot of water. The Court indicated in sustaining plaintiffs' (buyers') objection that "That's another matter, isn't it, Mr. Jeppesen, as to whether or not there has been any rights actually acquired." (Tr. 24 Line 14-16)

The Court clearly was not preventing sellers, by sustaining the objection, from showing frustration and impossibility to perform. Counsel for appellants was directing his remarks to other matters which were correctly objected to and properly sustained by the Court on the basis of parol evidence. Counsel for appellant stated, "This contract was only one document of a continuing business agreement between the parties to develop water and land

in Grantsville,. . ."(Tr. 25, Lines 9-14). The Court replied,

". . .but at this state of the proceeding I am not convinced that we should go beyond the borders of this agreement. As the evidence may develop later that may be and you may renew that request, Mr. Jeppesen. It's denied at this time. (Tr. 25, Lines 17-21).

Later in the proceedings the Court did allow testimony concerning the identity of water rights in existence at the time the Contract was entered into and testimony concerning the sellers' efforts to obtain other identified water rights for the subject property.

The court in permitting this testimony stated the following:

THE COURT: ". . .what the Court would permit you to do, if you so desire, is to offer any testimony that there might be as to whether there was in fact in existence any water right at the time this Contract was entered into." (Tr. 44).

THE COURT: ". . .I would permit some parol testimony here if it can be viewed as such as to what the intention of the parties were concerning this furnishing of a one second foot of water. It appears on the face of this agreement that there was to be a second foot of water furnished by the defendant. Now, if he represented that he had a second foot that he could furnish that's one thing; and if he represented he had no rights when he was going to get them that's something else." (Tr. 45).

Pursuant to the Court's direction testimony was received concerning the identity of the water rights. Mr. Rex Larsen, an employee of the State Engineers' Office, testified about the sellers early attempts to get the "Buzianis right" transferred to the subject property.(Tr. 48).

After that attempt had failed Rex Larsen outlined the steps the sellers took to get the "Bernard Castagno right" assigned to them and transferred to the subject property. (Tr. 50).

Melvin Church himself was allowed to specify those certain water rights he attempted to obtain to perform his part of the Contract. (Tr. 90-91). The sellers were afforded ample opportunities during the trial to identify the water rights they intended to supply the subject property.

The court did not err in refusing to look beyond the four corners of the contract since the intent of the parties was clear on the face of the contract, the doctrine of frustration can be shown by extrinsic evidence, and the court in fact permitted all testimony offered by appellants to show the intent of the parties regarding water rights and frustration of performance. Thus it is clear that appellants' contention that the court did not afford them the opportunity by sustaining the buyers' objection, to identify the water rights and thereby show frustration and impossibility to perform by supplying the one second foot of water is totally without merit.

POINT III

THE COURT PROPERLY EXCUSED THE SELLERS FROM
SUPPLYING THE WATER UNDER THE CONTRACT AND
PROPERLY ABATED THE CONTRACT PRICE FOR SUCH
FAILURE OF PERFORMANCE.

Appellants in their brief on appeal have overlooked the succinct finding of the trial court that "the defendants

were unable at the time of the trial to perform" with respect to the one second foot of water to be conveyed to the buyers. (Findings of Fact Tr. 142, Lines 6-11). Appellants have set forth tedious accounts from the record concerning their inability to so perform under the Contract. This however was specifically acknowledged by the trial court in its findings.

Appellants argue that their inability to convey the one second foot of water under the Contract invoked the equitable doctrine of frustration to excuse their performance. However appellants have also overlooked the fact that the trial court did specifically excuse them from conveying the one second foot of water to the buyers. The sellers were not required by the court to specifically perform this provision of the Contract since they were unable to do so. In fact the trial court actually applied the relief the appellants have suggested on appeal. The sellers were not required to acquire for the benefit of the buyers or convey one second foot of water to the buyers and the sellers were not required to pay for the water they had previously bargained for but could not be supplied. The Court therefore made the following uncontroverted findings of fact and conclusion:

"...the Court now finds that the plaintiffs have at all times performed under the terms of the contract; that the defendants have

failed to perform that portion of the contract that provides for their furnishing one second foot of water for the use of plaintiffs during the term of the contract, and is now unable to perform further by a conveyance of such a water right and that the subject real property has a vlaue of \$1,500 per acre if one second foot of water is available to irrigate the same.

And that the reasonable value of one second foot of water that the defendant failed to furnish and provide is \$12,000."

". . .and based upon those findings the Court concludes that the plaintiffs are entitled to specific performance of the contract as it applies to the real estate portion thereof; but since the defendants are unable to perform that portion of the contract pertaining to the use and conveyance of one second foot of water, an abatement of \$12,000 of the purchase price of the contract is made."

The specific performance ordered by the Court was the conveyance of the remaining parcel of real property provided by the Contract and did not deal with the water rights. Buyers did receive an abatement on the Contract price for the value of the water unable to be furnished by Sellers.

Hence the Court's decision was the most equitable result that could have been possibly fashioned under the circumstances. The buyers had entered upon the property, made improvements and conveyed a portion of it to their daughter, and a total rescission of the Contract would have been extremely egregious and unwarranted under the facts.

The sellers were compelled to perform what they could under the Contract by conveying the remaining parcel

of land, but were further relieved of their obligation to convey the one second foot of water.

This remedy is characterized as specific performance with an abatement of the purchase price for the term not performed and is outlined in 71 Am Jur 2d, Specific Performance, §129 as follows:

"In actions by a vendee for specific performance of a contract for the sale of real estate, where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is not only entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith by requiring him to give the best title he can or convey what he has, but he may compel the vendor to convey his defective title or deficient estate, and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full."

The court in the instant case required the sellers to convey to the buyers the deficient estate. That is the balance of the land without the water. The buyers were awarded an abatement of the purchase price for the deficiency of the quality of the estate, that is the failure of the sellers to furnish the one second foot of water, the Court thereby abated the contract price in the sum of \$12,000.00 compensating the buyers for the sellers failure to perform the contract in full.


CONCLUSION

The Contract entered into by the parties was clear

and unambiguous, with respect to the water rights to be conveyed thereunder, and the Court did not err in refusing to look beyond the four corners of the contract since the intent of the parties was clear on the face of the contract, the doctrine of frustration can be shown by extrinsic evidence, and the court in fact permitted all testimony offered by appellants to show the intent of the parties regarding water rights and frustration of performance. Whereupon the Court found the sellers unable to convey the one second foot of water and further relieved them of their responsibility to do so and abated the purchase price accordingly. Appellants have never argued that the land should not have been conveyed under the Contract, therefore the remedy effected by the Court was the only just and equitable solution to all parties.

It should be noticed that appellants' counsel in their argument has utilized testimony that was ordered stricken from the record by the trial court which use is certainly not in the best professional taste.

Respectfully submitted this 19th day of April, 1976.


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CERTIFICATE OF HAND DELIVERY

I hereby certify that two (2) copies of this brief were hand delivered to Alan K. Jeppesen, Attorney for Defendants-Appellants, 90 North Main Street, Tooele, Utah, on this 19th day of April, 1976.

A handwritten signature in cursive script, reading "Edward A. Watson", is written over a horizontal line.

EDWARD A. WATSON

Attorney for Plaintiffs-Respondents